

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**AMAZON.COM SERVICES, LLC
dba AMAZON WAREHOUSE LGB3
410 Terry Ave. N.
Seattle, WA 98109-5210**

Employer

Inspection No.

1473644

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Amazon.com Services, LLC (Employer or Amazon) operates a retail distribution warehouse, referred to as LGB3, in Eastvale, California (LGB3 or the warehouse). Beginning on April 29, 2020, the Division of Occupational Safety and Health (the Division), through Compliance Officer Timothy Decker (Decker), conducted a complaint investigation at the warehouse.

On October 6, 2020, the Division issued one citation to Employer for two alleged violations of California Code of Regulations, title 8.¹ Citation 1, Item 1, alleged a Regulatory violation of section 3203, subdivision (b)(2) [failure to document employee safety and health training]. Citation 1, Item 2, alleged a General violation of section 3203, subdivision (a)(7) [failure to provide effective safety and health training on the new workplace hazard of COVID-19]. Only Citation 1, Item 2, remains at issue.

Employer timely appealed. The matter was heard before Administrative Law Judge (ALJ) Howard Chernin, via the Zoom platform, on October 5, 2021, December 15, 21, and 22, 2021, and August 31, 2022. Staff Counsel Mark Licker represented the Division. Attorneys Kevin Bland and Martha Casillas of Ogletree Deakins represented Employer. Attorney Timothy Shadix of the Warehouse Worker Resource Center represented third party Matthew Flores.

The ALJ's Decision, issued on December 30, 2022, affirmed Citation 1, Item 1, and vacated Citation 1, Item 2. The Division's timely Petition for Reconsideration (Petition) followed. Employer timely filed a reply (Answer) opposing the Petition. The Division's primary argument is that Amazon presented information on COVID-19 through passive communication methods, which, the Division asserts, cannot be considered training.

¹ Unless otherwise specified, all section references are to California Code of Regulations, title 8.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did the Division establish by a preponderance of evidence that Employer failed to provide effective safety and health training on the workplace hazard of COVID-19?

FINDINGS OF FACT

1. In early 2020, the virus SARS-CoV-2, a novel coronavirus that causes the respiratory illness now known as COVID-19, emerged as a new workplace hazard in California.
2. On March 4, 2020, Governor Gavin Newsom declared a State of Emergency in California due to COVID-19.
3. LGB3, an Amazon fulfillment center located in Eastvale, California, is used to receive, store, pack, and ship consumer merchandise.
4. On April 29, 2020, the Division commenced an inspection of LGB3.
5. At the time of the inspection, LGB3 employed between 3,000 and 5,000 employees split between two shifts.
6. Amazon did not dispute that COVID-19 was a new workplace hazard in March, 2020, or that it was obligated to provide training on the new hazard presented by COVID-19.
7. In response to the emergence of the COVID-19 hazard, starting in March, 2020, Amazon instituted a series of measures designed to address the hazard.
8. These measures included training on how to avoid contracting and spreading COVID-19, as well as a number of operational changes intended to impede the spread of COVID-19 between employees at LGB3.
9. Amazon engaged in efforts to attempt to ensure that all employees had received and understood the training.
10. Amazon failed to adequately document COVID-19 training.
11. In disseminating information about its COVID-19 policies and procedures, Amazon relied on some methods of oral and written communication that were not subject to documentation.

DISCUSSION

1. **Did the Division establish by a preponderance of the evidence that Employer failed to provide effective safety and health training on the workplace hazard of COVID-19?**

Citation 1, Item 2, alleges a violation of section 3203, subdivision (a)(7). The safety order requires employers to “establish, implement and maintain an effective Injury and Illness Prevention Program” (IIPP) that does the following:

- (7) Provide training and instruction
[...]

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; [and]

(E) Whenever the employer is made aware of a new or previously unrecognized hazard[.]

In the Alleged Violation Description (AVD) for Citation 1, Item 2, the Division alleged:

Prior to and during the course of the inspection the employer failed to provide effective safety and health training on COVID-19 and procedures to mitigate potential exposure, in that the employer did not ensure that all employees had access to, viewed and understood all COVID-19 training materials, and employees were unaware of key elements in the training materials, including but not limited to, sanitation of work stations and frequently touched objects in the workplace.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).) “Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

The Division may prove a violation of section 3203, subdivision (a)(7), by showing that the employer’s implementation of required training was inadequate or ineffective to make the employees proficient or qualified in recognizing and avoiding the hazard at issue. (*FedEx Freight, Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018).) Proof of adequate training may include training records and/or employee testimony. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014); *Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008) (*Blue Diamond*).) Just as the existence of training records may support a conclusion that training occurred, a “lack of records, coupled with employee testimony indicating that no training was provided, may lead to a reasonable inference that no such training was provided.” (*Blue Diamond, supra*, Cal/OSHA App. 02-1268.)

Here, there is no dispute that COVID-19 constituted a new or previously unrecognized hazard, triggering Amazon’s duty to provide training and instruction. The main issue is whether Employer provided effective training regarding the COVID-19 hazard. Resolving this issue requires the Board to examine the factual background in the context of relevant authority and precedent in significant detail.

A. Factual Background.

LGB3 is an Amazon fulfillment center of over one million square feet. LGB3 receives, stores, picks, packs, and ships consumer merchandise. At the time of the inspection, LGB3 employed between 3,000 and 5,000 employees, split between two shifts. In early 2020, COVID-19 emerged as a new workplace hazard. Amazon was not required to shut down the LGB3 warehouse, because its employees were essential in shipping consumer items during California's early lockdown and beyond.

B. Amazon's Training Methods.

Beginning in March 2020, Amazon instituted a number of efforts to inform employees about how to protect themselves and others from COVID-19 exposure and transmission in the warehouse. The information contained in these communications was updated as new information became available. The topics included, but were not limited to, information on proper mask usage, maintaining social distancing, hand-washing, sanitizing workstations, and staying home when sick or awaiting the results of a COVID-19 test.

Many, or most, of Amazon's methods were in written form, often accompanied by graphics or illustrations. These included:

- Information on posters and signs located throughout the warehouse, including at the entrance, in break rooms, and in bathroom stalls.
- Information displayed on 55 to 60 inch video screens (called "acid feeds") throughout the warehouse.
- Messages and information on the screens of employees' electronic work devices, such as handheld scanners and computer screens at workstations.
- Emails to employees through Amazon's "A to Z" system.
- Text messages to employees' personal cell phones through Amazon's "Text Them All" system.
- In-person observation, instruction, and verification of employee knowledge and compliance with COVID-19 protocols, conducted by non-supervisory employees designated as training or safety "ambassadors."
- Beginning in approximately August 2020, new hires received a computer-based training ("K-NET") module on COVID-19.

K-NET modules are computer-based training, in which new employees watch videos or read at their own pace. The K-NET COVID-19 training module included the following topics on COVID-19 prevention:

- Social Distancing
- Improved Access to Cleaning Products
- Deep Cleaning of Work Areas, Surfaces and Equipment
- Additional Personal Protective Equipment
- More Thorough and Frequent Hand Washing
- Temperature Checks Upon Arrival
- Supporting Employees to Stay Home if Symptomatic

The ALJ considered each of these topics when evaluating the effectiveness of Amazon's training, reasoning that these topics provided a useful metric for assessing whether Employer's training gave employees the knowledge and ability to recognize, understand and avoid the hazard of COVID-19. We agree and do the same here.

In addition, Amazon utilized methods to reinforce its purported training on how to avoid COVID-19. These included:

- Visual and physical indicators to enforce social distancing, such as Plexiglas barriers around workstations and colored tape on floors in high-traffic areas.
- Video monitors displaying live streams of warehouse walkways, with onscreen superimposed digital circles around employees, which changed color from green to red if employees were not maintaining six feet of social distancing ("Project Speedbump").
- Making cleaning products available for employees to sanitize their workstations.
- production quotas to allow time for reading safety messages, cleaning workstations, and hand-washing.
- Conducting temperature checks as employees entered the warehouse.
- Providing masks to employees.
- Monitoring and enforcement of social distancing and mask use in areas where employees congregated.
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- Loosening or eliminating "time on task" and production quotas to allow time for reading safety messages, cleaning workstations, and hand-washing.
- Conducting temperature checks as employees entered the warehouse.
- Providing masks to employees.
- Monitoring and enforcement of social distancing and mask use in areas where employees congregated.

Amazon does not dispute that its employees were exposed to the hazard of COVID-19. Instead, Amazon argues that its methods were effective in training employees on the hazard, in compliance with section 3203, subdivision (a)(7).

Along with evidence of its purported training methods, Amazon offered the testimony of one witness, Gina Bardessono (Bardessono). Bardessono was Amazon's senior site safety manager at LGB3 during the inspection period, and had held that role since January 2018.

Bardessono's testimony:

Bardessono testified that COVID-19 information was provided to employees in "numerous ways." Bardessono testified in detail as to the various elements of Amazon's training program, "as well as how Amazon implemented and enforced its training through observation, coaching and auditing." (Decision, pp. 13-15, 16.)

At the beginning of the COVID-19 pandemic, Amazon halted in-person "stand-up" meetings with employees. Starting in March 2020, Bardessono testified, Amazon used preexisting informational systems for communicating information about COVID-19 to employees. Beginning in approximately August 2020, Amazon also provided and documented a training module for new

hires through its “K-NET” platform. (Exhibit 10.) Bardessono testified that the K-NET COVID-19 training module took approximately ten minutes to complete.

Prior to implementation of the K-NET COVID-19 training for new hires, Amazon asserts that it trained employees on these same topics through preexisting methods. Bardessono testified that employees were accustomed to receiving information through all of these methods. (HT 12/21/2021, pp. 43, 44.)

Amazon’s training methods are described above. According to Bardessono, between April and October 2020, these various types of messages informed employees to wash their hands, stay six feet apart, practice proper mask usage, observe operational changes, and stay home when sick. Bardessono further explained that similar messages were displayed on video monitors throughout the building (“acid feeds”). Bardessono testified that the texts and emails did not require employees to confirm that they had read and understood the information. Nor were all employees specifically instructed to read the messages that were displayed on various screens.

In addition, Bardessono testified that Amazon utilized physical signage in the warehouse to educate employees about COVID-19 protocols. Information was displayed on posters, A-frame signs, and stand-up boards, which had previously been used to notify employees of schedule changes and other types of information at LGB3. Bardessono also testified that Employer posted signs in bathroom stalls to communicate COVID-19 information to employees. These various types of signage included the same information noted above; i.e., information on procedures such as social distancing, hand washing, mask usage, and where to clock in and out. (See Exhibits 5, AA, EE, Q, R.) However, Bardessono testified, employees were never specifically directed to read these signs.

Bardessono testified that employees were encouraged to go to managers and non-managerial “ambassadors” – experienced employees customarily assigned as “peer trainers” to new hires – with questions about COVID-19 protocols. (HT 12/21/2021, pp. 48-50, 149.) However, Bardessono testified that she was not certain whether the ambassadors specifically provided training to new hires on COVID-19. Bardessono also testified that when employees did ask questions, they would sometimes be directed to view information displayed on the TV screens in the warehouse (HT 12/21/2021, p. 63.)

Bardessono also testified that Amazon conducted daily COVID-19 safety audits. (Exhibit Z.) As part of these audits, Bardessono testified that employees designated as “safety champions” (distinct from the aforementioned “ambassadors”) were stationed throughout the warehouse to observe, enforce, and verify employee knowledge and compliance with COVID-19 protocols. Bardessono testified that the role of this team, also known as the “social distancing team,” evolved as new information on COVID-19 emerged during the period of April to October 2020. According to Bardessono, the social distancing team engaged in such tasks as checking temperatures of employees entering LGB3, maintaining sanitation stations, enforcing social distancing and mask use, and personally coaching and training employees on COVID-19 related topics. (See HT 12/21/2021, pp. 92-95, 106, 149, 183, 205.)

The Division offered the testimony of Decker, as well as two employee witnesses, Matthew Flores (Flores) and Douglas Larsen (Larsen), to show that LBG3's employees were not effectively trained on COVID-19. Their relevant testimony is summarized below.

Decker's testimony:

Decker inspected LBG3 once, on April 29, 2020. Decker testified to Amazon's use of "a plethora of different materials that were provided as training." (HT 10/5/2021, p. 218.) He testified that during his inspection, he observed and photographed a variety of signage, administrative controls, and other means Amazon used at LBG3 to communicate and reinforce information and safety protocols on COVID-19. (Exhibits 4, 5, 6, G, J-MOD.) These included the aforementioned signage and posters, text messages, the A-Z app, messages on TV screens, and workscreen messages, the latter of which provided questions on COVID-19 safety that employees had to answer before logging in. (See, e.g., Exhibits 4, 5, 6, 10, T, U, AA, CC, DD, EE, FF.)

Decker testified that the only evidence of "comprehensive" and "documented" COVID-19 training that he received from Amazon was the K-NET module itself (Exhibit 10), which was given only to new hires. (HT 10/5/2021, pp. 205, 223, 229.) Like Bardessono, Decker testified that he believed the K-NET training was meant to take about 10 minutes, based on language contained within the materials.

Decker also testified that he observed employees in the main break room, sitting and standing close together, without masks, and "on their phones or doing other things rather than eating." (HT 10/5/2021, pp. 199-201; Exhibit 8.) Decker interpreted this as evidence that employees were not effectively trained. (HT 10/5/2021, p. 257.) The ALJ, however, viewed "this testimony as speculative because Decker did not ask the employees what they were doing or take other measures to determine whether they were effectively trained. Because this specific evidence is speculative, it is afforded less credibility and weight." (Decision, p. 16.)

Larsen's testimony:

Larsen was employed at LBG3 from approximately April 2020, to April 2021. Larsen worked as a "stower" (an employee who places incoming inventory in designated locations to be picked for delivery when purchased), and worked in the equipment cage, checking in and out electronic devices, such as laptops, scanners, and radios, for employee use. (HT 8/31/2022, pp. 35-36.)

Although he did not receive the K-NET COVID-19 training, Larsen testified that he was trained on the topics presented in that K-NET module. (HT 8/31/2022, pp. 26-34.) Larsen testified that, although he did not receive "formal training [...] in a classroom," he nonetheless received "continual" and "constant" training on COVID-19 from Amazon. (HT 8/31/2022, pp. 23-24, 31.) He testified that training topics included social distancing, proper mask wearing, how to clean and sanitize his workstation and equipment, and remaining home from work while sick or awaiting test results. (HT 8/31/2022, pp. 22, 29-31, 33, 35.) He confirmed that "there were people that worked throughout the building that helped enforce social distancing and proper wearing of your mask and those type of things." (HT 8/31/2022, p. 23.)

Larsen testified that he was specifically instructed to sanitize his workstation and equipment, and that he was either given or had ready access to cleaning products. (HT 8/31/2022, pp. 33-34, 36, 52-53.) Larsen also personally helped to check employees' temperatures as they entered the warehouse, and was given some instruction on how to do so. (HT 8/31/2022, pp. 37-38.) Larsen did not specifically testify on the topic of "more thorough and frequent handwashing." (Decision, p. 12.) With the exception of this topic, Larsen's testimony indicated that he received effective training on all topics included in the K-NET module. This training was done, Larsen testified, through informational posters and signage throughout the facility, computer and scanner log-in screen messages, messages on video screens in the warehouse, and in-person instruction and interaction from both managers and "ambassadors." (HT 8/31/2022, pp. 23-24, 30-33.)

The ALJ gave substantial weight to Larsen's testimony, "which is credited, and which supports a finding that Employer took reasonably quick action to institute comprehensive training and instruction on the COVID-19 hazard at LBG3." (Decision, p. 15.) The ALJ reasoned, "Although not every employee necessarily received precisely the same training in precisely the same way, Larsen testified to the overall effectiveness of the training in communicating the hazard to employees as well as how to avoid it through such measures as masking, social distancing, hand washing and workstation sanitizing." (Decision, pp. 15-16.)

Flores's testimony:

Flores was employed at LBG3 between approximately October 2018 and May 2021. He was, at various times, a "picker" (an employee who selects items for shipping), a "packer," and a "counter" (an employee who checks in inventory). (HT 10/5/2021, pp. 51-53.) Flores requested and received third-party status as an affected employee in this matter, alleging that he was exposed to the hazards described in Citation 1, Item 2. (HT 10/5/2021, p. 7.) Flores's testimony was inconsistent and often self-contradictory. For this reason, the ALJ gave less weight to Flores's testimony than to Larsen's. (Decision, pp. 15-16.)

Flores testified that he received training from Amazon on COVID-19, although he disputed its quality, finding it "bland," "vague," and "not enough information." (HT 10/5/2021, pp. 67, 134, 135.) Nevertheless, Flores confirmed that Employer's training, which he received, included information on social distancing, handwashing, masking, cleaning and sanitation of work areas and surfaces, and staying home when sick or awaiting test results. (HT 10/5/2021, pp. 67, 79, 91, 129, 130-133, 135, 142-145, 149.) With the exception of temperature checks upon arrival, which was not a topic of Flores's testimony, Flores testified that he did receive training on the topics addressed in the K-NET training module.

Flores testified that he received information on these topics from messages on signs and posters in different areas of the warehouse, text messages, the A to Z app, video monitors throughout the warehouse, and workstation log-in screens. These methods were supplemented and reinforced through social distancing reminders given through "Project Speedbump," taped markers on floors, and one-way warehouse entrance and exit lanes, all of which he was aware were part of Employer's COVID-19 protocols. (HT 10/5/2021, pp. 66-67, 70-71, 79, 91, 106-107, 120, 127, 129, 130-133, 135, 137-138, 139, 140, 142-145, 147, 149.)

Flores initially denied ever being instructed or trained to clean his workstation and wash his hands (HT 10/5/2021, pp. 70-71, 90-91, 102, 125), but admitted that although he was not “verbally” told to do so, he saw reminders and instructions to do so in text messages, on the A to Z app, displayed on video monitors, and on his workstation computer screen. (HT 10/5/2021, pp. 67, 71, 106-107, 135.) He testified that cleaning supplies were visible from his work area. (HT 10/5/2021, p. 70.) Flores also denied, but then admitted, seeing other information included in the K-NET module, which was posted or displayed in the warehouse. (HT 10/5/2021, pp. 66-67, 76-77, 79, 91, 106, 158, 159-160.)

Flores testified that he was never specifically instructed to read the posters, fliers, video monitors, and other written communications on COVID-19 in the warehouse, but admitted that he did think Amazon intended and expected him to read them, and that he did, in fact, read and understand these communications. (HT 10/5/2021, pp. 164, 165-166.) The ALJ concluded, “Although Flores maintained at various times during his testimony that he was not effectively trained on the COVID-19 hazard, Flores’s testimony demonstrates that he was effectively trained by Employer on how to recognize and avoid it.” (Decision, p. 18.)

C. Legal Analysis.

The issue the Board must address is whether Amazon’s training program met its obligation to “provide training and instruction” for the new hazard presented by COVID-19. (§ 3203, subd. (a)(7).) The very nature of COVID-19, a novel, potentially fatal, and highly contagious virus, presented unforeseen challenges for both employees and employers. Employers could no longer rely upon traditional in-person methods of training, such as classroom sessions, since grouping people together was antithetical to the hazard, and moreover had to rapidly adapt the content of their training as new information on COVID-19 became available. Essential employees, such as those at LGB3, played an invaluable role in ensuring that others received necessary goods and services, and did so in a time of unprecedented fear and uncertainty. We also acknowledge that Amazon took swift measures to address employee safety in the early stages of the COVID-19 pandemic. Nevertheless, our task is to determine whether Amazon’s COVID-19 training satisfied the safety order.

The Board has long described training on workplace hazards as a “critical element and the touchstone of any effective IIPP.” (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (March 26, 2002).) The purpose of training, under section 3203, subdivision (a)(7), “is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to[.]” (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003); *Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Further, regardless of the means or methods selected to provide training, the training must be “effective.” (§ 3203, subd. (a).) More specifically, the training must be adequate and effective to make employees “proficient or qualified” to recognize, understand, and avoid the hazard in question. (*Siskiyou Forest Products*, *supra*, Cal/OSHA App. 01-1418.) Here, the parties do not dispute that training must be “effective,” but they do offer fundamentally contradictory positions on what constitutes “training” and whether certain methods of conveying information can ever be considered “effective.”

The dispute is, in part, definitional. The Division’s position is that Amazon’s efforts amounted to communications, not training. The Division emphasizes the distinction between “communication” and “training,” each of which are mandated by separate components of the safety order. Section 3203, subdivision (a)(3), requires an IIPP to “include an effective system for communicating with employees” on matters relating to occupational safety and health. (§ 3203, subd. (a)(3).) Subdivision (a)(3) provides that “[s]ubstantial compliance” with the safety order’s communication requirement can be achieved through “meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.” (§ 3203, subd. (a)(3).) In contrast, section 3203, subdivision (a)(7), requires an employer to provide effective “training and instruction” regarding new or previously unrecognized workplace hazards. (§ 3203, subd. (a)(7).) The Division argues that Amazon’s efforts constituted communication methods as contemplated by section 3203, subdivision (a)(3), but not training as contemplated by section 3203, subdivision (a)(7).

The Division argues, “The Board should reconsider the ALJ decision and issue an opinion clarifying the difference between the requirement for mandatory training on new hazards mandated by Title 8 CCR section 3203(a)(7) and other communication tools as listed in 3203(a)(3) that may be helpful to reinforce that training.” (Petition, p. 2.) The Division asserts that something more than “passive communication” is required to “train” an employee effectively. While “[n]ot all training needs to occur in a formal classroom setting,” the Division argues, “training” implies “the allocation of employees’ time and attention to instruction from a qualified person who is explaining the hazard or task at hand.” (Petition, p. 10.)

Next, the Division also argues that only training which is, or can be, documented under section 3203, subdivision (b)(2), may satisfy the training requirements of section 3203, subdivision (a)(7). Section 3203, subdivision (b)(2), requires the employer to maintain records of all required training. Such records must be kept “for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers.” (§ 3203, subd. (b)(2).) However, “passive communications” are not always amenable to such documentation. For example, it is not clear that an employer could record the “employee name or other identifier, training dates, type(s) of training, and training providers” for passive communications such as posters, flyers, or signage.

Amazon, in turn, argues that “‘training’ and ‘instruction’ are complementary terms describing the educative process required by section 3203(a)(7) [...] A reading of this lends to an understanding that training can be defined as communication of knowledge to employees with the purpose of educating them.” (Answer, p. 5.) Amazon asserts that the evidence presented at hearing established the efficacy of its training, and that its training methods satisfied the requirements of section 3203, subdivision (a)(7), particularly in light of “the turbulent history of the COVID-19 pandemic, the uncertainty surrounding the virus itself, [and] the precautions needed to prevent exposure and its spread[.]” (Answer, p. 2.)

For reasons discussed below, we think both the Division and Amazon are correct on some points and incorrect on others.

The Division’s position that Amazon’s communications cannot constitute training is overly restrictive. Amazon is correct that the terms “training” and “communications” are not necessarily inconsistent. Training must necessarily involve some form of communication. Significant here, section 3203, subdivision (a)(7) is a performance standard. Nothing in the language of the safety order requires training to be in any specific form. A performance standard intentionally lacks specificity. It “establishes a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions.” (*Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014), citing *Davey Tree Service*, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012). See Gov. Code, § 11342.570.)

Effective training methods will vary from one workplace to another, and lawmakers are not in the best position to anticipate what methods will be most effective in a particular workplace. Different workplaces present different hazards, and workplaces also differ in terms of employees’ levels of literacy, English proficiency, and so forth. When crafting performance standards, the Standards Board has therefore “recognized that it would not reasonably be able to anticipate every situation that may arise at worksites around California, and has intentionally left room for employers to comply in a variety of ways.” (*Contra Costa Electric, Inc.*, *supra*, Cal/OSHA App. 09-3271.)

On the other hand, while we quibble with the Division’s definitional argument, we think the Division is correct that a training program that relies predominantly or exclusively on passive communications is rarely, if ever, capable of meeting an employer’s training obligations under section 3203, subdivision (a)(7).

First, practical considerations caution against safety training done solely through passive communications. If an employer’s training and instruction obligations can be satisfied with any simple form of passive communication, employers have little or no incentive to provide more functional, interactive training. Employers could simply rely on their communication efforts, e.g., workplace safety signage, posters, emails, and text messages. It is not difficult to imagine examples of how replacing hands-on training with communications would undermine workplace safety.

Additionally, if passive communications alone may constitute training, this could effectively delegate the burden of training to the employee. For example, if an employer merely places a poster or sign on the wall, or sends an email or text message, but the employee’s reading of the sign is optional, untracked, and unenforced, the primary responsibility for acquiring training falls upon the employee.

Labor Code section 6400, subdivision (a) provides, “Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.” This non-delegable responsibility for ensuring safe working conditions lies on employers, not employees. (See Lab. Code, §§ 6400, 6401, 6402, 6403, 6404; *Hansford Industries, Inc. dba Viking Steel*, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 13, 2021).) The Board has consistently rejected interpretations of safety orders that delegate the responsibility for compliance to employees. (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (March 26, 2021).)

A program that relies in whole or in part on passive communications, therefore, still requires the employer to take action to ensure those communications are effective, i.e., that the training gives employees the knowledge and ability to recognize, understand and avoid the hazard in question. A program that merely distributes communications, without taking action to ensure their effectiveness, falls short of the requirements of section 3203, subdivision (a)(7).² Reliance on such passive communications, without more, places the primary responsibility for acquiring necessary safety information on the employee. To the extent an employer relies on passive communications, an employer must take some affirmative action (e.g., monitoring or testing) to ensure that the passive communications, whether alone or in conjunction with other training, are in fact effective to make each employee proficient in identifying and avoiding the safety hazard.

The Board does not categorically state that passive communications can never qualify as part of training. Such communications may provide valuable reinforcement to an employee's ability to identify and avoid safety hazards. Some employees may even require written reminders, guides, posters and signage to become effectively trained, making such communications a useful, or even necessary, component of effective training.

Moreover, if the Board were to limit, as a matter of general application, the training methods available to employers, the Board would arguably exceed its authority. The Board's "function is confined to interpreting and applying the safety orders adopted by the Standards Board. It may not go beyond that function and ignore or revise the requirements of a [safety] order." (*Superior Construction Inc.*, Cal/OSHA App. 96-2267, Decision After Reconsideration (Dec. 21, 2000).) In interpreting safety orders, the Board must neither insert what has been omitted, nor omit what has been inserted. (See *Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1709.) In short, the Board "cannot impose stricter or more detailed requirements than those set in a safety order promulgated by the Standards Board." (*Mobil Oil Corp.*, Cal/OSHA App. 00-222, Decision After Reconsideration (Apr. 29, 2002).)

Next, we disagree, in part, with the Division's assertion that only training which is, or can be, documented under section 3203, subdivision (b)(2), may satisfy the training requirements of section 3203, subdivision (a)(7).

The Board has long held that the absence of training records is not necessarily dispositive evidence that training did not occur. The Board has held, "The purpose of section 3203(b)(2) is to establish a means for employers to have readily accessible proof that they have complied with the

² We note that this approach coheres with the analogous federal standard. Analyzing the corresponding federal training regulation, the Occupational Safety and Health Review Commission (Commission) recognized that the standard "does not limit the employer in the method by which it may impart the necessary training." (*Capform, Inc.*, 2001 OSAHRC LEXIS 15, *7 (O.S.H.R.C. March 26, 2001).) Thus, for example, "company safety rules, policies, and instructions do not need to be written so long as they are clearly and effectively communicated to employees." (*Id.*, at *2.) Likewise, if training is provided in the form of safety policies or other documents, the employer must ensure that employees read and understand those documents, or otherwise provide training as to their content. (*Compass Envtl., Inc.*, 2010 OSAHRC LEXIS 41, *10 (O.S.H.R.C. June 10, 2010) [affirming citation where employer distributed safety documents, but there was no evidence the employee "received any training on that safety plan or even read" the safety documents].) Thus, the Commission affirmed a violation where the employer "did not make certain, and had no record, that employees had actually read and understood the [safety training] mini-manual." (*McLeod Land Services, Inc.*, 2003 OSAHRC LEXIS 127, *8 (O.S.H.R.C.A.L.J. October 22, 2003); see also *Concrete Construction Co.*, 15 BNA OSHC 1614 (No. 89-2019, 1992) [affirming violation where employer provided no training other than distributing a safety booklet].)

[section 3203(a)(7)] training requirements.” (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (April 5, 2002).) The Board has never held, however, that all information conveyance must be documented in order to be considered training. These are separate regulatory requirements. Had the Standards Board wished a failure to document training, under section 3203, subdivision (b)(2), to automatically establish a failure to train, under section 3203, subdivision (a)(7), it would have written the safety orders to require that result.

A failure of documentation alone is thus “not dispositive” in establishing a violation of section 3203, subdivision (a)(7). (*Bellingham Marine Industries, Inc.*, *supra*, Cal/OSHA App. 12-3144.) In other words, Board precedent dictates that a lack of training records alone does not prove that an employer’s training was inadequate or ineffective. A failure to document training in such a way to satisfy section 3202, section (b)(2), does not automatically establish a violation of section 3203, subdivision (a)(7).

However, we do not suggest that the absence of training records is irrelevant. Under the Board’s longstanding approach, proof of adequate training may include training records and/or employee testimony. (*Bellingham Marine Industries, Inc.*, *supra*, Cal/OSHA App. 12-3144; *Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008) (*Blue Diamond*).) Just as the existence of training records may support a conclusion that training occurred, a “lack of records, coupled with employee testimony indicating that no training was provided, may lead to a reasonable inference that no such training was provided.” (*Blue Diamond*, *supra*, Cal/OSHA App. 02-1268.) An employer may rebut or counter this finding. Based on the foregoing, the Board holds that effective, adequate, and appropriate training under section 3203, subdivision (a)(7), requires an employer to satisfy the following elements:

- (1) The training must provide the information necessary to enable employees to recognize, understand, and avoid the subject hazard; and
- (2) The employer may not delegate to the employee the primary responsibility for acquiring the information necessary to become able to recognize, understand, and avoid the subject hazard.

Having set forth the appropriate analysis on this question, the Board now turns to its application to the facts in this case.

1. Did Amazon’s training provide the information necessary to enable LGB3 employees to recognize, understand, and avoid the hazard of COVID-19?

First, we consider whether Amazon’s training provided LGB3 employees with the information necessary to recognize, understand, and avoid the hazard of COVID-19. The record demonstrates that Amazon satisfied this factor.

As discussed in detail above, the training topics contained in the K-NET COVID-19 training module (Exhibit 10) were comprehensive in providing necessary information on

recognizing, understanding, and avoiding the COVID-19 hazard.³ Both Flores and Larsen testified that they received training on these topics, including social distancing, proper use of masks, hand-washing, sanitizing surfaces, and staying home when sick or awaiting COVID-19 test results.

The primary evidence offered to establish Employer's training was inadequate was Decker's testimony that he observed and photographed employees in the break room without masks, less than six feet apart "while doing things other than eating." (Exhibit 8; Decision, pp. 8, 16.) Both Larsen and Flores testified that it was sometimes difficult to actually comply with the hazard reduction strategy of social distancing, because LGB3 employees were often in highly congested areas such as hallways during shift changes, and while eating in break rooms.

This, however, is not necessarily evidence of insufficient training. Crowded quarters during break and meal periods would appear to be less a failure of training, and more a failure on Amazon's part to identify and correct hazards (§ 3203, subs. (a)(4), (a)(6)) through such measures as staggering shifts, providing additional break areas, or otherwise making it physically possible for employees to maintain a safe social distance. The Division did not cite Amazon under those safety orders. In addition, the ALJ noted that Decker did not ask those employees any questions, "or take other measures to determine whether they were effectively trained." (Decision, p. 16.)

We therefore find that Amazon's training satisfied this factor.

2. Did Amazon delegate to employees the primary responsibility for acquiring the necessary information?

Second, we consider whether Amazon delegated to employees the primary responsibility for acquiring the necessary information to recognize, understand, and avoid the hazard of COVID-19. For the reasons explained above, this is the dispositive factor in this matter. We conclude that Amazon satisfied this factor. We emphasize that, because section 3203, subdivision (a)(7), is a performance standard, this is a fact-specific determination, and here we must take into account the very nature of the COVID-19 hazard, which limited employers' ability to conduct in-person training through the usual methods.

³ The Division also argues that Employer's training cannot be considered effective because it did not include topics such as, "COVID-19 is an infectious disease caused by a virus that is spread through airborne droplets," "why social distancing is important," and, "the hazards of COVID-19 as well as Employer's policies for reducing the risk of transmission." (Petition, pp. 16, 17, 18.) These specific topics are not required by section 3203, subdivision (a)(7). These topics were instead included in the original iteration of section 3205, subdivision (c)(5). Section 3205 was implemented in November 2020, a month after the issuance of the Division's citation in this matter. This section, as originally written, was in effect from November 30, 2020, until January 2023. It has since been modified. As of February 2023, the training requirement of section 3205, which is now in subdivision (c)(3), states, in its entirety, "Employees shall receive training regarding COVID-19 in accordance with subsection 3203(a)(7)." Employer was not cited under section 3205, nor could it have been at the time of the inspection and issuance of the citations. An employer cannot violate a safety order that was not yet in effect at the time of the alleged violation. (*Hill Crane Service, Inc.*, Cal/OSHA App. 1135350, Decision After Reconsideration (Sep. 24, 2021); *Western States Steel, Inc.*, Cal/OSHA App. 84-1089, Decision After Reconsideration (Aug. 13, 1987).) Employer's training under section 3203, subdivision (a)(7), thus cannot be found ineffective for the reason that it did not include all topics enumerated in the original version of section 3205, subdivision (c)(5), which was not yet in effect.

As discussed, Flores and Larsen testified that they received the necessary information through numerous alternative training methods such as text messages, posters and signage, messages on video monitors, messages on workstation log-in screens, and the A to Z app. Further, Amazon also took measures to confirm and ensure its training was effective. Primarily, Amazon's social distancing team observed employee compliance with safety protocols, asked employees questions to ensure they understood the protocols, and verified in daily safety audits that employees had both followed their training and correctly answered questions about Amazon's COVID-19 training. (Exhibit Z.)

We therefore agree with the ALJ that, "Although certain aspects of Employer's training program could have likely been improved, the evidence as a whole supports a conclusion that Employer provided overall effective training, and any deficiencies were immaterial and incidental to the overall effective training provided." (Decision, pp. 16-17.)

DECISION

For the reasons stated, we affirm the Decision of the ALJ.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member



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